# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD D. SMITH,

Defendant-Appellant.

UNPUBLISHED
July 1, 2003

No. 238166
Wayne Circuit Court
LC No. 01-000178-01

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with the intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

In his sole issue on appeal, defendant argues that there was insufficient evidence to sustain his four convictions. We disagree. In reviewing the sufficiency of the evidence to support a conviction, we determine whether, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod 441 Mich 1201 (1992). In doing so, however, this Court may not determine the weight of the evidence or the credibility of the witnesses, even if the testimony is inconsistent or vague – that determination is left for the trier of fact. *Id*. at 514-515.

At trial, two police officers testified that after being dispatched to a Detroit apartment building they proceeded to the second floor where they encountered defendant's brother and another male leaving Apartment 203. One of the police officers then entered the apartment where he observed defendant sitting in a recliner playing a computer game with a juvenile, who was seated in a chair near defendant. The recliner in which defendant was sitting was located immediately next to a glass-topped table, on which the officer observed a number of sandwich-sized, clear plastic baggies that were later determined to contain both cocaine and marijuana.[1] Defendant was then ordered by the officer to stand, revealing a loaded nine-millimeter handgun

[1] Two of these baggies contained a total of forty-five smaller packets of cocaine.

on which defendant had been sitting. Defendant did not have cocaine, marijuana, or drug paraphernalia on his person.

Defendant first argues that his mere proximity to the marijuana and cocaine found by the officer was insufficient to prove that he possessed these items. However, while it is true that proximity to a controlled substance is not, in and of itself, sufficient to support a finding of possession, possession may nevertheless be demonstrated by circumstantial evidence, including proximity. *People v Griffin*, 235 Mich App 27, 34-35; 597 NW2d 176 (1999); *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). Moreover, an individual may be in constructive possession of a controlled substance where the totality of the circumstances suggests a "nexus" between the defendant and the contraband sufficient to support an inference that the defendant had the right to exert dominion and control over the contraband. *Wolfe, supra* at 521; *Griffin, supra* at 34. The evidence here, when viewed in a light most favorable to the prosecution, was sufficient to show such a nexus.

As noted above, defendant was found seated immediately next to a glass-topped table on which a substantial amount of marijuana and cocaine was plainly displayed. Defendant's close proximity to the clearly visible drugs, when considered in connection with the discovery of the gun, which was found directly beneath him, was sufficient to permit a reasonable trier of fact to infer that defendant constructively possessed both the cocaine and the marijuana. See, e.g., *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995) (close proximity to contraband in plain view is evidence of possession).[2]

Defendant also disputes the sufficiency of the evidence showing that he intended to deliver the cocaine, as required to sustain a conviction under MCL 337.7401(2)(a)(iv). However, our Supreme Court has held that an intent to deliver can be inferred from minimal circumstantial evidence, such as the quantity of the cocaine in the defendant's possession and the manner in which the cocaine was packaged. *Wolfe, supra* at 524. Here, defendant was found seated next to forty-five plastic baggies, each containing cocaine, and the police officers did not find any drug paraphernalia that would indicate the possibility of personal use. The absence of evidence to indicate personal use, the quantity of cocaine in defendant's possession, and the manner in which the cocaine was packaged was sufficient evidence to support an inference by a reasonable trier of fact that defendant intended to deliver the cocaine. *Id*. at 524-525.

Defendant next disputes the sufficiency of the evidence to support his convictions of carrying a concealed weapon and possession of a firearm during the commission of a felony. Specifically, defendant argues that there was simply no evidence to show that he had knowledge of the gun's presence in the recliner. Again, we disagree. This Court has held that to sustain a conviction of carrying a concealed weapon, the element of knowledge may be shown by

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[2] Although defendant claims that the cocaine and the marijuana could have belonged to others present in the apartment that night, we note that "the prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence is presented." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 1999 (1998). As such, it was not the prosecution's burden to disprove defendant's claim that the cocaine and marijuana could have belonged to others. *Id*.

evidence indicating that the defendant "had a pistol on [or about] his person concealed in a purposeful manner." *People v Lane*, 102 Mich App 11, 15; 300 NW2d 717 (1980); see also MCL 750.227. Here, the jury could reasonably conclude that the act of sitting on a gun constituted purposeful concealment and that this act, when coupled with defendant's proximity to the cocaine and marijuana, established that defendant knowingly possessed the gun for the purpose of protecting the drugs that were on the table next to him. *Lane*, *supra*; see also *People v Clark*, 21 Mich App 712, 714-715; 176 NW2d 427 (1970) (a weapon that is not discernible by ordinary observation is concealed). That defendant was seated immediately next to the drugs and directly on top of the gun was similarly sufficient to support defendant's conviction of felony firearm. See *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (constructive possession is established if the firearm's location is known to the defendant and it is reasonably accessible to him).

We affirm.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray